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No. 86-473

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

GWALTNEY OF SMITHFIELD, LTD.,
Petitioner,

v.

CHESAPEAKE BAY FOUNDATION, INC.,

and

NATURAL RESOURCES DEFENSE COUNCIL,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR THE PETITIONER

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1. The court below held that "citizen suits *like the one at bar*, seeking civil penalties for permit violations committed entirely in the past, are permitted" under the Clean Water Act. App. 17a (emphasis supplied). The Fifth Circuit in *Hamker* v. *Diamond Shamrock Chemical Co.*, 756 F.2d 392, 395 (1985), held to the contrary that a citizen plaintiff "must allege a violation occurring at the time the complaint is filed." Respondents stipulated in this case that the last violation occurred a full month before the suit was filed. App. 6a n.7, 7a, 86a, 93a. Both the Court of Appeals and the District Court below recognized that their holdings were contrary to the holding

of the Fifth Circuit in *Hamker*. *See* App. 8a, 15a, 39a-40a. In light of the foregoing, respondents' efforts to mitigate the direct and irreconcilable conflict between the decision below and *Hamker* are completely unavailing.[1]

It is not surprising that respondents do not once quote from the opinion of the Fifth Circuit in *Hamker*, relying instead on the brief concurring opinion of Judge Williams. Br. in Opp. at 33. They fail to note, however, that Judge Williams began his comments by emphasizing that the court's opinion "carries my full concurrence." 756 F.2d at 399.[2] Nor does Judge Williams's opinion in any way serve to distinguish the present case from *Hamker*. Judge Williams wrote separately simply to note that the term "in violation" should encompass "the violator who intentionally 'turns off the spigot' just before a citizen brings suit." *Id.* Such facts are not present here, and neither the District Court nor the Court of Appeals suggested that they were. Far from "turning off the spigot," Gwaltney continues to discharge appropriately treated effluent into the Pagan River, pursuant to its permit. Gwaltney attained compliance with the Act because it installed a new, state-of-the-art wastewater treatment system. Gwaltney began planning that system *two years* before respondents filed suit, Ct. App. Ex. Vol. at 353-381, and completed construction of the system *eight months* prior to suit. Ct. App. JA at 97. Chlorine violations had ceased *twenty months* prior to suit. *See*

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[1] The principal authority on which respondents rely is *Student Public Interest Research Group* v. *AT&T Bell Laboratories*, 617 F. Supp. 1190 (D.N.J. 1985), repeatedly cited in their brief. *See* Br. in Opp. at 16, 17, 19, 21, 22, 28, 31, 37. That District Court decision cannot, of course, diminish the conflict between the Fourth and Fifth Circuits, and the court in that case expressly recognized that its holding was contrary to *Hamker*. 617 F. Supp. at 1194-95, 1198-99.

[2] Respondents thus err in referring to the court's opinion as a "majority opinion." The opinion in *Hamker* was unanimous.

App. 87a. Respondents' suggestion that Gwaltney undertook these substantial capital improvements as a means of "turning off the spigot" to avoid a citizen suit that would not be filed for many months ascribes to Gwaltney a degree of clairvoyance for which there is no support in the record.[3]

2. Respondents suggest that the *result* below and the result in *Hamker* can be reconciled on the basis of a theory expressly rejected by the court below. According to respondents, even if a continuing violation is required under the citizen suit provision, jurisdiction can be found in this case because they made a good-faith allegation of a continuing violation. Br. in Opp. at 38-40. The court below, however, not only declined to accept this theory but also declined to decide if in fact respondents had made a good-faith allegation of continuing violation. App. 7a-8a n.9. Obviously no such allegation could be made with respect to chlorine violations, which ceased twenty months prior to suit. App. 87a. Nor could any such allegation be made with respect to TKN violations, since it was evident before suit was filed that Gwaltney's new system would achieve compliance with the Act, as in fact it did. Two months before respondents filed suit, the State Water Control Board recognized, as a result of Gwaltney's capital improvements, that "the violations * * * are under control," Ct. App. Ex. Vol. at 425, and in fact—as respondents stipulated—the last violation occurred a month

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[3] Respondents seriously mischaracterize petitioner's position. Contrary to respondents' assertion, Gwaltney does not contend that "citizens may obtain only injunctive relief." Br. in Opp. at 21. If a citizen suit is properly before a court—because the defendant was "in violation" of the Act when suit was filed—then the court may impose civil penalties. As was clearly stated in the Petition, "there is no jurisdiction for a citizen suit unless the suit concerns an ongoing violation," but "once such a suit is before a court it may order civil penalties." Pet. at 15.

prior to suit.[4] In light of the foregoing it is difficult to see how any allegations of ongoing violations could have been made in good faith.

Nor, in any event, would acceptance of respondents' theory reconcile the decision below with *Hamker*. Plaintiffs in *Hamker* also alleged that the defendant's conduct would result in future violations of the Act, 756 F.2d at 394, 397-398, and lower courts applying *Hamker* have recognized that jurisdiction cannot be sustained on the basis of mere allegations. *See* Pet. at 21 & n.13.

3. Respondents urge that the present case would not serve as an "appropriate vehicle" for resolving the conflict between the decision below and *Hamker*. Br. in Opp. at 15. In support of this contention, they suggest that the facts of the two cases are somehow distinct. With respect to the issue over which the Fourth and Fifth Circuits split, however, the cases are indistinguishable. The question petitioner presents to this Court is whether citizen suits may be brought under the Clean Water Act seeking civil penalties for purely past violations. The violation in *Hamker* clearly ceased prior to suit. *See* 756 F.2d at 394. In the present case, respondents *stipulated*

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[4] Respondents' suggestion that the Board was somehow misled is wholly unfounded. Br. in Opp. at 7-8 n.4. Contrary to respondents' assertion, Gwaltney officials testified not that Gwaltney was "in compliance" at the March 25-26, 1984 public hearing, but rather that there had been "no violations of TKN" since the last reported violations. Ct. App. Ex. Vol. at 422. That statement was entirely accurate. Gwaltney in fact had no violation of daily TKN limits in March, and while there was a violation of the monthly average limit, by its nature such a violation cannot be determined until the end of the month—after the meeting in question. *See* App. 73a. Gwaltney officials fully and accurately described the functioning of the new wastewater treatment facility at the hearing, and at the end of the hearing the Board—which had been continuously and actively involved in the design, installation, and operation of the system—declined to take any enforcement action. Ct. App. Ex. Vol. at 425.

that the last violation by Gwaltney also occurred a full month prior to suit. App. 6a n.7, 7a, 86a, 93a. The legal issue is thus starkly presented. The stipulations remove all factual disputes and make this case an ideal vehicle for resolving the direct conflict between the Fourth and Fifth Circuits.

4. Respondents also suggest that this Court should permit the conflict between the Circuits to persist, in the hope that the Fifth Circuit may change its mind. Br. in Opp. at 34-37. There are, as respondents note, cases presenting this issue pending before the Fifth Circuit; there are also similar cases at various stages in the Fourth Circuit and elsewhere around the country. There is no more reason to suppose that the Fifth Circuit will dramatically overturn a precedent only one year old than there is to suppose that the Fourth Circuit will reverse its ruling in this case. The fact that cases presenting this issue are pending in the lower courts, *see* Pet. at 22-23 n.15, simply highlights the need for guidance from this Court on whether the Fourth Circuit or the Fifth Circuit correctly interpreted the statute.

Respondents concede that the cases pending before the Fifth Circuit do not even involve the same fact situation as that in *Hamker*. In those cases, the discharge reports "showed violations subsequent to the filing of suit as well as before." Br. in Opp. at 35 n.12. In both *Hamker* and this case, the violations ceased prior to suit. *See* 756 F.2d at 394; App. 6a n.7, 7a, 86a, 93a. It is thus difficult to discern how any decision by the Fifth Circuit in the appeal pending before it could mitigate the conflict between the decision below and *Hamker*.

5. Finally, respondents contend that serious practical difficulties would result from reading the statute—as written by Congress—to permit citizen suits only against those alleged "to be in violation" of the Act. According to respondents, the lag time in the filing of discharge

monitoring reports means that citizen plaintiffs can never be certain if a violation is occurring when they file suit. Therefore, respondents reason, jurisdiction should be found even if the defendant is not in fact "in violation" when suit is filed, to avoid thwarting the plaintiffs' "expensive and time-consuming preparation for litigation." Br. in Opp. at 26-27. This purported problem only arose in this case, however, because Gwaltney achieved compliance with the Act before suit was filed. It seems a curious argument that the parties and the courts should be put through the expense and time of a full trial—when the objectives of the Clean Water Act have already been achieved—simply to avoid "thwarting" the expense and time allegedly incurred in *preparation* for trial.

Respondents plainly exaggerate the expense and time involved. Although they allege, without citation of any authority, that "violations typically are not reported until at least a month after they have occurred," Br. in Opp. at 27, the record in this case demonstrates that Gwaltney's reports were typically completed about *one week* after the end of the covered month. Ct. App. Ex. Vol. at 312-350. Plaintiffs in citizen suits can thus promptly learn whether a continuing violation exists, without any waste of litigation resources. And the expense and time involved in filing a complaint in these cases is virtually nonexistent. The entire case turns on the discharge monitoring reports furnished by the defendants themselves, which generally suffice to establish a violation of the Act. *See* Pet. at 23-24. The remarkable ease of filing such suits makes the wait of one week for a current discharge monitoring report a truly insignificant burden, particularly since jurisdiction will only be lacking when—as here—the defendant has already achieved full compliance with the Act.

Respondents' contentions do nothing to mitigate the direct conflict between the decision of the Fourth Circuit below and that of the Fifth Circuit in *Hamker*. This

Court should grant the writ to resolve this conflict over the proper interpretation of the jurisdictional provision of an important Federal statute.

Respectfully submitted,

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